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Transforming Humanitarian Intervention from an Expedient Accident to a Categorical Imperative

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TRANSFORMING HUMANITARIAN INTERVENTION FROM AN EXPEDIENT ACCIDENT TO A CATEGORICAL IMPERATIVE

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I. INTRODUCTION

History, even if one focuses on the past fifty years, is replete with almost countless instances of preventable mass killings of people at the hands of their own government.[1] In nearly all cases, the rest of the world has stood idly by, sometimes apparently frozen into inaction. Wealthy nations have remained deliberately ignorant of events, their citizens glued to MTV or the next major sporting event. Despite their power, these nations consistently fail to intervene militarily in order to bring a quick end to government-sponsored mass killings.[2]

This is not to deny that there has been considerable discussion regarding the merits of humanitarian military interven-

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1. *See, e.g.,* Kadic v. Karadic, 70 F.3d 232 (2d Cir. 1995) (assessing the complaints of Croat and Muslim citizens of the internationally-recognized nation of Bosnia-Herzegovina, formerly a republic of Yugoslavia, who claimed that they were victims of various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign during the Bosnian civil war); J. L. Holzgrefe, *The Humanitarian Intervention Debate*, *in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 15–17 (J. L. Holzgrefe & Robert O. Keohane eds., 2003) [hereinafter HUMANITARIAN INTERVENTION] (describing the atrocities in Rwanda beginning in 1994).

2. Examples include the mass killing of citizens in Cambodia, Sudan, Rwanda, among many others. *See, e.g.,* Michael J. Bazyler, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia,* 23 STAN. J. INT'L L. 547, 550 (1987) (discussing killing of Cambodians by the Khmer Rouge); Romeo Dallaire, *Looking at Darfur, Seeing Rwanda*, N.Y. TIMES, Oct. 4, 2004, at A25.

tion.[3] As observed by James Upcher in his analysis of international law and humanitarian intervention: "[w]hether seen as right, responsibility or missionary enterprise, the merits of intervention are commonly framed within a wider debate about the putative conflict between human rights and state sovereignty."[4]

Formally, the main obstacle to humanitarian intervention is the notion of state sovereignty.[5] In reality, however, the main disinclination to stop preventable mass killings of strangers in other parts of the world is simply that they are strangers and are in other parts of the world.[6] On rare occasions, the world (or parts of it) has "stepped up" and drawn a line in the sand—a line inscribed on a moral or political plane, as contrasted with the geographical line marking a state's boundary—and said "no" to despots to stop them from more mass killings of their citizens.[7] While this has been rare, the success of these interventions, combined with an absence of criticism following such

3. *See, e.g.*, BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION (Gene M. Lyons & Michael Mastanduno eds., 1995) [hereinafter BEYOND WESPHALIA] (collecting essays from presentations on international intervention and theoretical issues about the nature of state sovereignty and the evolution of international society); ANNE ORFORD, READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW 83–85 (James Crawford et al. eds., 2003) (stating that those who favor humanitarian intervention see intervention as a necessity which restores human rights and democracy; argues that principles of sovereignty and non-intervention should be abandoned); Holzgrefe, *supra* note 1, at 17 (discussing the legal and ethical issues implicated by the international community's lack of intervention into the Rwandan crisis and those which might have arisen if it had intervened).

4. James Upcher, *'Savage Wars of Peace'? International Law and the Dilemma of Humanitarian Intervention*, 9 DEAKIN L. REV. 261, 263 (2004).

5. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 111 (June 27) (state sovereignty is closely linked with the principles of the prohibition of the use of force and of non-intervention codified in, *inter alia*, Article 2.1 and 2.4 of the United Nations Charter); U.N. CHARTER art. 2, paras. 1, 4.

6. As is discussed *infra*, state sovereignty is, at least at the pragmatic level, not a barrier to humanitarian intervention. There are numerous examples of successful armed military humanitarian intervention which have been declared as being contrary to international law.

7. The best example perhaps being Tanzania's intervention in Uganda in 1978, in order to overthrow Idi Amin. Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, *in* HUMANITARIAN INTERVENTION, *supra* note 1, at 219.

actions, demonstrates that state sovereignty is no barrier to humanitarian interventions.[8] Indeed, this suggests that respect for state sovereignty is an excuse, rather than a reason, for the inaction of the world community.

At present, humanitarian intervention is subject to the vagaries of geo-political forces beyond the comprehension of even the most ardent student of or commentator on international affairs.[9] The only clear trend seems to be that proximity to Western Europe enhances the chances that intervention will occur.[10] Overall, intervention is adventitious, almost accidental, or even opportunistic in nature.[11] In this Article, we suggest a process whereby humanitarian intervention can be systematized and, moreover, transformed into a *duty* upon nations. Human life, especially when there are thousands at stake, is too important to leave to chance.

We need some kind of "bureaucratizing [of] the Good Samaritan."[12] That is to say, altruism needs to be established in an administrative manner, rather than left to voluntaristic happenstance. The principles that properly govern humanitarian intervention must be international ones, neutral as to the spe-

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8. *Id.* at 220.

9. John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 793 (2004).

10. Compare Kosovo (intervention) with Somalia and Rwanda (no intervention). *Id.*

11. There is a long history of opportunistic interventions justified on supposed human rights grounds (such as protecting minorities), including: Japan's 1931 invasion of Manchuria, Hitler's 1938 invasion of Czechoslovakia, and India's 1987 military intervention in Sri Lanka. Thomas G. Weiss & Jarat Chopra, *Sovereignty under Siege: From Intervention to Humanitarian Space*, *in* BEYOND WESTPHALIA, *supra* note 3, at 93. *Ad hoc* intervention is typified by, for example, the military intervention carried out after the first Iraq war, to protect the Kurds of Northern Iraq, without the consent of the government of Iraq. Robert H. Jackson, *International Community Beyond the Cold War, in* BEYOND WESTPHALIA, *supra* note 3, at 79. Negative consequences of the *ad hoc* approach are discussed by ORFORD, *supra* note 3, at 13.

12. TONY WATERS, BUREAUCRATIZING THE GOOD SAMARITAN: THE LIMITATIONS TO HUMANITARIAN OPERATION 3 (2001). Today, the task of engaging in and completing humanitarian operations is more efficient for the victim and the donor than in the past because organizations providing relief have become more bureaucratized. *Id.* Bureaucracy allows the inherent functions of the organization to be broken down into tasks done by specialists hired and trained to do each action efficiently and effectively. *Id.* In this way, today's Good Samaritan agencies are not unlike the large bureaucracies of modern business and government. *Id.*

cific States involved in any particular case.[13] For this reason, the imperative for intervention, when it exists, will be a categorical imperative in a (at least quasi-) Kantian sense: the rule must be such that in willing it, we must will it as universal.[14] Further, its imperative nature will be of the essence: when the necessary conditions are fulfilled, corresponding action must be taken; failing to take action results in extending culpability to bystanders.

It is undeniable that the world's population, as a whole, continues to suffer in large numbers. Poverty is a major cause: "about 2.8 billion people still live on less than $2 a day and the richest one percent of the world's people receives as much income each year as fifty-seven percent of the poorest."[15] Moreover, armed conflict and internal strife have continued unabated. A perfect example of this is the 1994 genocide in Rwanda that "left some 800,000 ... murdered in 100 days," while France "armed and diplomatically defended the genocidal government."[16] During the twentieth century alone, it is estimated

13. The neutrality that is sought may be something of an ideal, given the problematic nature of neutrality in the context of humanitarian intervention. Amy Bartholomew, *Human Rights and Post-Imperialism: Arguing for a Deliberative Legitimation of Human Rights*, 9 BUFF. HUM. RTS. L. REV. 25, 35 (2003).

14. Immanuel Kant argued that true moral imperatives are "categorical"; that is, they are demands upon individuals and entities that would be accepted by all as universally applicable, irrespective of preferences, convenience or cost-benefit analyses on any particular occasion. *See* H. J. PATON, THE CATEGORICAL IMPERATIVE: A STUDY IN KANT'S MORAL PHILOSOPHY 127–32 (1948).

15. Ivan Simonovic, *Relative Sovereignty of the Twenty First Century*, 25 HASTINGS INT'L & COMP. L. REV. 371, 380 (2002).

16. Samantha Power, *Raising the Cost of Genocide*, *in* THE NEW KILLING FIELDS: MASSACRE AND THE POLITICS OF INTERVENTION 250 (Nicolaus Mills & Kira Brunner eds., 2002). The Rwandan genocidal campaign began when a plane carrying Rwanda's Hutu President, Juvenal Habyarimana, was destroyed by a surface-to-air missile. *Rwanda Marks Genocide Anniversary*, BBC NEWS, June 6, 2004, *available at* http://news.bbc.co.uk/1/hi/world/africa/3602859.stm. "The crash served as a signal to Hutu extremists, supporters of the government, to start the systematic liquidation of minority ethnic Tutsis and any Hutu opponents of the regime." *Id.* Despite France's denial of involvement in the mass killings, Rwandan President Paul Kagame has asserted that France trained the Rwandan "militia to kill, knowing they intended to kill." *Id.* According to the BBC, France was the closest ally of the

that governments killed 170 million of their own citizens.[17] This is greater than the total number of people killed in wars between States, including both World Wars.[18]

In essence, the gap between rich and poor nations is not diminishing.[19] As a result, many of the world's citizens do not enjoy the most basic of amenities required for subsistence, let alone the opportunity to flourish.[20] Today, despite the popularity of human rights as a discussion topic,[21] the fight for gender

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Hutu regime in 1994 and it was known that French military advisers worked with the Hutu government army right up to the beginning of the genocide. *Id*.

17. UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2002: DEEPENING DEMOCRACY IN A FRAGMENTED WORLD 2, 6 (2002).

18. Simonovic, *supra* note 15, at 376. During the First World War, approximately 8.5 million military combatants died, compared to approximately 13 million civilian casualties. *See, e.g*., ZBIGNIEW BRZEZINSKI, OUT OF CONTROL: GLOBAL TURMOIL ON THE EVE OF THE TWENTY-FIRST CENTURY (1993). The death toll for the Second World War is estimated at 71 million, which includes military deaths, civilian deaths as a direct result of hostilities, civilians killed during the Sino-Japanese War, and as a result of Hitler's murders. *Id*. at 9. However, different sources estimate different counts; the median death toll approximated by these sources is 50 million. *See* Matthew White, *Twentieth Century Atlas: Worldwide Statistics of Casualties, Massacres, Disasters and Atrocities*, Matthew White's Homepage, *at* http://users.erols.com/mwhite28/20centry.htm (last visited Jan. 8, 2005). White estimates that during the twentieth century, approximately 188 million people have died as a result of genocide and tyranny, military conflicts including both combatant and civilian deaths, and man-made famine. *Id.*

19. BOARD ON SUSTAINABLE DEVELOPMENT, NATIONAL RESEARCH COUNCIL, OUR COMMON JOURNEY: A TRANSITION TOWARD SUSTAINABLE DEVELOPMENT 71 (1999), *available at* http://www.nap.edu/books/0309067839/html/ (last visited Feb. 8, 2005) ("Recent increases in wealth could be seen as leading to a world characterized both by the popular economics maxim—a rising tide raises all boats big and small—and by the increasing division between rich and poor in absolute as well as relative terms.").

20. Roughly 2.8 billion people live on less than $2 a day and the wealthiest one percent of the world's population receives as much income annually as fifty-seven percent of the world's poorest. Simonovic, *supra* note 15, at 380.

21. *See, e.g.,* Upcher, *supra* note 4, at 263 (discussing debate over the conflict between human rights and state sovereignty in the context of humanitarian intervention); THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS (2002) (discussing the use of force in cases of egregious violation of human rights and humanitarian law)*;* Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection From Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507 (1993) (discussing the enforceability, under international human rights law, of American women's fundamental right to state protection from domestic violence).

equality continues,[22] unemployment and poverty are increasing,[23] people are dying of hunger and illness every day[24] and the right to asylum is being questioned.[25]

In this Article, we do not attempt to propose a solution to the general problems afflicting the world's citizens not fortunate enough to be born in a First World nation. The analysis within this Article is confined to one particular problem faced by millions of non-First World citizens: how to reduce the chance that they will be summarily killed by their own government. If this problem is not expressly addressed now, legal and social commentators will be forced to address the same issue into the twenty-second century. We should not wait until then. It is only reasonable to believe that waiting will result in future generations seeking solutions while lamenting the killing of another 170 million or more people by their own government. One century with 170 million preventable deaths is sufficient reason to seriously consider fundamental reform of the global approach to government-sponsored killings of their own people.

It is important to note from the outset that the prospect of developing a workable principle for humanitarian intervention is realistic only if carried out in full awareness of the difficulties

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22. *See* Culliton, *supra* note 21, at 507. *See also* Craig v. Boren, 429 U.S. 190 (1976) (striking down an Oklahoma statute for reasons of gender-based discrimination); Frontiero v. Richardson, 411 U.S. 677 (1973) (holding that classifications based upon sex are inherently suspect and must be subjected to strict judicial scrutiny).

23. *See, e.g.,* Carina J. Miller, *Protecting the Argentine Jewish Community and Jewish Identity in Times of Crisis: Local Efforts, Global Community, and Foreign Support*, 16 FLA. J. INT'L L. 677, 680 (2004) ("The process of economic liberalization and restructuring undertaken in the mid-1990s increased the concentration of income in the wealthiest sectors of society, generated increasing rates of unemployment and poverty, and left millions of Argentines with precarious jobs or with multiple poorly paid jobs."); Paul Lewis, *World Bank Says Poverty is Increasing*, N.Y. TIMES, June 3, 1999, at C7 (the number of people living on less than $1 per day rose from 1.2 billion to 1.5 billion from 1987 to 1999).

24. *See* Lewis, *supra* note 23.

25. *See* Mirko Bagaric & Penny Dimopoulos, *Refugee Law—Time for a Fundamental Re-Think: Need as the Criterion for Assistance*, 9 CANTERBURY L. REV. 268, 270–92 (2003). *See also* Andrew Clapham, *Remarks*, 35 COLUM. HUM. RTS. L. REV. 517, 520 (2004) ("The question of terrorism is sometimes now portrayed as human rights granting people too many rights to asylum, too many rights to lawyers while under interrogation, too many rights from physic pressure during interrogation.").

involved. First, the circumstances under which humanitarian intervention will be permitted must be clearly designated. This requires specific articulation of the rights to be protected. Second, a proportionality requirement must be included to ensure that the cure is not worse than the illness. Finally, rules of reasonableness must be implemented to prevent occupying forces from exploiting the other State.

The following section of this Article provides a brief overview of the law on humanitarian intervention. Part III discusses the moral dimension of altruistic conduct in relation to intervention. The final substantive section of this article, Part IV, discusses development of a workable principle for humanitarian intervention and the circumstances in which States should be compelled to use force to save strangers in distant places.

II. LAW OF HUMANITARIAN INTERVENTION AND THE SLOW DEMISE OF SOVEREIGNTY

A. Problems Associated with Humanitarian Intervention

Since the second half of the twentieth century, wars for territory (i.e., interstate wars) have largely been replaced by struggles for power within States.[26] This trend both reflects, and contributes to, the decline in significance of state sovereignty in the twenty-first century.[27] In relation, human rights abuses, often associated with internal State conflicts, present stark challenges to traditional State-based international law.[28] With intrastate conflicts it becomes necessary to ask whether, and/or under what circumstances, a State may declare that an emergency situation legitimises the abrogation of its human rights

26. Susan Strange, *World Order, Non-State Actors, and the Global Casino: The Retreat of The State?*, *in* POLITICAL ECONOMY AND THE CHANGING GLOBAL ORDER 82, 84 (Richard Stubbs & Geoffrey Underhill eds., 2d ed. 2000).

27. Gene M. Lyons & Michael Mastanduno, *Introduction: International Intervention, State Sovereignty, and the Future of International Society*, *in* BEYOND WESTPHALIA, *supra* note 3, at 3.

28. *See, e.g.*, Robert O. Keohane, *Political Authority After Intervention: Gradations in Sovereignty*, *in* HUMANITARIAN INTERVENTION, *supra* note 1, at 273.

obligations.[29] Humanitarian law[30] has adapted and expanded in recognition of the changing nature of conflicts around the world, but it has not yet satisfactorily answered the question: "[h]ow can military intervention ever be humanitarian?"[31] As state sovereignty weakens and intervention becomes increasingly likely, the urgency in finding an answer to this question increases.

Humanitarian intervention always takes place in a political, as well as a legal and moral environment.[32] As observed by James Upcher, "[p]roponents of intervention have a double task: both justifying the legality of a doctrine of intervention, and exposing the antiphonal pronouncements of governments pursuing illicit and venal motives behind humanitarian rhetoric."[33] Some international commentators have identified an emergence of intervention in the human rights law that has developed since the inauguration of the UN Charter.[34] These commentators discern a recalibration of sovereignty in favour of ethical concerns.[35] Citing Michael Ignatieff, Upcher notes that, for such commentators, "to defend the principle of non-intervention, contained in Article 2(4) of the Charter, is to de-

29. *See generally* JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (1992) (examining the international standards governing protection of human rights in situations of public emergency).

30. Humanitarian law is generally defined as the law relating to armed conflict. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 654 (Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann eds., 1987) (stating that the expression of international humanitarian law applicable in armed conflict means international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict).

31. Robert O. Keohane, *Introduction*, *in* HUMANITARIAN INTERVENTION, *supra* note 1, at 1.

32. Michael Ignatieff, *State Failure and Nation–Building*, *in* HUMANITARIAN INTERVENTION, *supra* note 1, at 299.

33. Upcher, *supra* note 4, at 263.

34. Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, *in* HUMANITARIAN INTERVENTION, *supra* note 1, at 245.

35. *Id.*

fend, in many cases, the perpetration of tyranny and terror."[36] Consistent with the views of such pro-interventionist commentators, it has been argued that "the drafting history of the UN Charter displays an awareness that, despite the prohibition on intervention in Article 2(4), force can be a permissible response to humanitarian catastrophe."[37]

B. Humanitarian Intervention as Condoned Anomaly in International Law

Specific examples of (putative) humanitarian intervention illustrate various general features of the process. Commonly cited examples of broadly successful intervention include: India's intervention in the war between Pakistan and East Pakistan (Bangladesh) in 1971;[38] Vietnam's invasion of Cambodia in 1978 and 1979;[39] and Tanzania's intervention to remove Idi Amin from Uganda in 1979.[40] On the basis of these examples, it has been claimed that "state practice…demonstrate[s] that states believe the right of unilateral humanitarian intervention is available to them as an option grounded in either the Charter or customary international law."[41] However, neither India, Vietnam or Tanzania sought legitimacy for their actions by reference to a norm of humanitarian intervention. Indeed, the General Assembly of the United Nations called upon India to withdraw its troops from East Pakistan,[42] despite India's claim

36. Upcher, *supra* note 4 (citing Michael Ignatieff, *Why are We in Iraq? (And Liberia? And Afghanistan?)*, N.Y. TIMES MAG., *Sept*. 7, 2003, at 38); *see also* Ignatieff, *supra* note 32, at 299. U.N. CHARTER art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

37. Upcher, *supra* note 4, at 269; *see also* Franck, *supra* note 7, at 204.

38. Franck, *supra* note 7, at 216 ("[I]n 1971, India invaded East Pakistan after military repression against separatists in that province had escalated to the point where a million persons had died and 8 million had fled to India.").

39. *Id.* at 217 ("Vietnam invaded Cambodia, in 1978, to rid it of a Khmer Rouge regime responsible for the deaths of at least 1 million people.").

40. *Id.* at 219 ("[I]n 1978 … Tanzania invaded Uganda to topple the murderous regime of Field Marshal Idi Amin. Some 300,000 deaths had been attributed to [Amin's] rule.").

41. FRANCIS KOFI ABIEW, THE EVOLUTION OF THE DOCTRINE AND PRACTICE OF HUMANITARIAN INTERVENTION 133 (1999).

42. The territory formerly known as East Pakistan is now the nation of Bangladesh. Oscar Schachter, *The Right of States to Use Armed Force*, 82

of self-defence and its comments on human rights-based necessity.[43] Vietnam and Tanzania both (if implausibly) claimed self-defence.[44]

In 1979, France's contribution to the overthrow of Bokassa in the Central African Empire, a clear breach of Article 2(4),[45] was not justified by France on humanitarian grounds.[46] The only modern-era assertion of a unilateral humanitarian justification for military intervention was by one of the three intervening States in the 1991 Iraq no-fly zone situation, constituting "a single partial exception in a half-century of non-intervention on humanitarian grounds."[47] Thus, even a "successful" intervention struggles to find legitimacy in terms of humanitarian factors. Additionally, the United Nations has been implicated in several "horrendous failures" based upon its unwillingness or inability to intervene in intrastate conflicts (e.g., Bosnia,[48] An-

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MICH. L. REV. 1620, 1629 (1984). G.A. Res. 2793, U.N. GAOR, 26th Sess., Supp. No. 29, at 3, U.N. Doc. A/L.647/Rev.1 (1971).

43. India's self-defense claim was based upon the large influx of refugees from East Pakistan. Franck, *supra* note 7, at 216–17.

44. *Id*. at 217, 219.

45. Article 2(4) of the UN Charter states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, para. 4.

46. Franck, *supra* note 7, at 220.

47. Michael Byers & Simon Chesterman, *Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law*, *in* HUMANITARIAN INTERVENTION, *supra* note 1, at 184.

48. In the 1990s, the former nation of Yugoslavia dissolved and erupted into religious and ethnic genocide among Bosnian Serbs, Muslims and ethnic Albanians. In July 1995, thousands of Muslims were killed by Bosnian Serb forces in the Bosnian town of Srebrenica in a campaign of "ethnic cleansing." From March to June of 1999, Serbian forces intensified attacks on Kosovo and forcibly expelled more than 850,000 ethnic Albanians. Rape and sexual violence were major components of the Bosnian Serb's ethnic cleansing. U.N. peacekeeping efforts were inadequate throughout. Finally, NATO responded with a bombing campaign on Serb forces around Kosovo. For further information, see Human Rights Watch, *Bosnia and Herzegovina: The Fall of Srebrenica and the Failure of U.N. Peacekeeping*, 7 HUM. RTS. WATCH REP., no. 13, at Summary (1995), *available at* http://www.hrw.org/summaries/s.bosnia 9510.html (last visited Feb. 28, 2005). *See also* Human Rights Watch, *A Village Destroyed: War Crimes in Kosovo*, 11 HUM. RTS. WATCH REP., no. 13(D), at Summary (1999), *available at* http://hrw.org/reports/1999/kosovo3/ (last visited Feb. 28, 2005).

gola,[49] Somalia[50] and Rwanda[51]).[52] Clearly, something needs to be done.

III. THE NORMATIVE AND PSYCHOLOGICAL DIMENSION: (UNSOUND) REASONS FOR RESISTING HUMANITARIAN INTERVENTION

It is necessary to look closely at the moral dimension of humanitarian intervention and to examine what has been called the "breadth" or "weight" of the moral concern.[53] There are two

49. In April 2002, the signing of a cease-fire agreement brought to an end nearly three decades of civil war in Angola. During the war, hundreds of thousands died and millions were displaced. Between 1991 and 1992, an estimated 1.3 to 2 million Angolans fled their homes. Between 1998 and 2002, an additional 3.1 million people fled their homes. The international community was slow to respond with adequate funds and logistics, even failing to respond in some situations. For more information, see Human Rights Watch, *Struggling Through Peace, Return and Resettlement in Angola*, 15 HUM. RTS. WATCH REP. No. 1, 5–8 (2003), *available at* http://www.hrw.org/reports/2003/angola0803/angola0803.pdf (last visited Feb. 28, 2005).

50. In 1991, Somalia's longtime dictator fled the country and Somalia erupted into anarchy and famine as clans of armed militias fought for power. During 1991 and 1992, an estimated 500,000 Somalis died before the world community took serious action. In December of 1992, the United Nations Operation in Somalia (UNOSOM) finally began to support aid deliveries, backed by 24,000 U.S. troops and 13,000 others (they departed in 1995). For more information, see Human Rights Watch, *Somalia Faces the Future, Human Rights in a Fragmented Society*, 7 HUM. RTS. WATCH REP., no. 2, at Summary (1995), *available at* http://www.hrw.org/reports/1995/somalia/ (last visited Feb. 28, 2005).

51. Between April and July of 1995 alone, an estimated 800,000 Rwandans, mostly Tutsi, were killed in the genocide by Rwandan Hutus, a loss representing an estimated 75% of the Tutsi population. Although the U.N. had peacekeeping troops on the ground, it did not order them to try to stop the violence. The Belgian troops in the U.N. peacekeeping forces even withdrew from the country. The United States took essentially no action. For more information, see HUMAN RIGHTS WATCH, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA (1999), *available at* http://www.hrw.org/reports/1999/rwanda/ (last visited Feb. 28, 2005).

52. *See* Elizabeth Consens, *Conflict Prevention, in* THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 101, 103 (David Malone ed., 2004).

53. Holzgrefe, *supra* note 1, at 51. Holzgrefe states:

> What should the breadth and weight of one's moral concern be? Should it extend beyond one's family, friends and fellow citizens? Should it extend to those nameless strangers in distant lands facing

main grounds, apart from the sovereignty consideration, that enable powerful States to deny moral culpability for refusing to prevent mass killings. They are the "Acts and Omissions Doctrine" and the "Doorstep Principle." The following two sections explore each these grounds and explain why they need to be abandoned.

A. Acts and Omissions Doctrine

1. Overview of the Doctrine

The Acts and Omissions Doctrine is relied upon by First World nations as a basis for deflecting liability for mass killings in other parts of the world. The Doctrine provides that people are only responsible for their positive acts, as opposed to events that they fail to prevent (omissions).[54] This Doctrine demarcates the circumstances in which individuals must help others in order to prevent life itself from becoming intolerably burdened. The Acts and Omissions Doctrine describes (and possibly explains) the fact that people tend not to feel obliged to devote substantive resources to assisting people who are worse off than themselves. The Doctrine acknowledges that individuals feel *less* responsible for the deaths and tragedies they fail to *prevent* than those they directly *cause*.[55] Thus, the Doctrine is

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> genocide, massacre, or enslavement? Should the needs of these strangers weigh as much as the needs of family, friends, and fellow citizens?

Id.

54. *See, e.g.*, Kelly Green, Note, *Physician-Assisted Suicide and Euthanasia: Safeguarding Against the "Slippery Slope"—The Netherlands versus the United States*, 13 IND. INT'L & COMP. L. REV. 639, 645 (2003) (discussing the impact of the Doctrine in the debate over morality and legality of physician-assisted suicide and euthanasia).

55. The Acts and Omissions Doctrine states that, morally, it is less egregious to omit doing an act which leads to a foreseeable negative result than it is to actually commit an act which leads to the same negative result. For example, under the Doctrine it is a lesser evil to fail to throw a life preserver to a person who is drowning than it is to push someone one knows cannot swim into the water to drown him or her. This moral distinction generally rests upon the notion that an omission is equivalent to not intervening in events which have already unfolded, i.e., the person was already drowning, versus an act which actually sets events into motion, i.e., pushing someone into the water to drown them. Thus, passive inaction, or omission, is less morally irreprehensible than action, because the person is not the source of causation. *See*

one justification for why failure to provide food to starving people in other nations is generally not equated with the reprehensibleness of shooting one's neighbour.[56] Nonetheless, this Doctrine is unsound.

Morality seems to make very few positive demands of individuals.[57] Generally, morality is delineated into a set of negatively-framed rules proscribing certain behaviours.[58] However, it is premature to conclude that we have discharged our moral obligations simply because we have not violated these negative rules. There are occasions when acting morally requires us to do more than merely refrain from certain behaviour, occasions when we must actually *do* something.[59] Defining morality exhaustively as a set of negative proscriptions fails to explain why refusal to act in various situations would be considered morally repugnant.[60]

KUMAR AMARASEKARA & MIRKO BAGARIC, EUTHANASIA, MORALITY AND THE LAW 115–19 (2002). *See also* Helga Kuhse, *Euthanasia*, *in* A COMPANION TO ETHICS 294, 297 (Peter Singer ed., 1991).

56. Kuhse, *supra* note 55, at 297. Kuhse states:

> Is the distinction between killing and letting die … morally significant? ....If killing and letting die were morally on a par, so the argument goes, then we would be just as responsible for the deaths of those whom we fail to save as we are for the deaths of those whom we kill—and failing to aid starving Africans would be the moral equivalent of sending them poisoned food … but even if a morally relevant distinction can sometimes be drawn between killing and letting die, this does not, of course, mean that such a distinction always prevails.

Id.

57. *See* Mirko Bagaric, *A Utilitarian Argument: Laying the Foundation for a Coherent System of Law,* 10 OTAGO L. REV. 163, 174 (2002) [hereinafter Bagaric, *A Utilitarian Argument*].

58. *See id.* at 163–80.

59. *See, e.g.,* Kuhse, *supra* note 55, at 298; PETER SINGER, PRACTICAL ETHICS 206–08 (2d ed. 1993).

60. Examples of inaction being deemed morally repugnant include such scenarios as: Bill Gates refusing to give his loose change to a starving peasant, or declining to save a child drowning in a puddle in order to avoid getting one's shoes wet, or refusing to throw a life-ring to a person drowning beside a pier. John Gardner has discussed the implications of a "self-effacingly extreme care" for others as a hypothetical model for tort. John Gardner, *Obligations and Outcomes in the Law of Torts*, *in* RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORÉ ON HIS EIGHTIETH BIRTHDAY 111, 112 (Peter Cane & John Gardner eds., 2001).

2. The Maxim of Positive Duty

Morality demands performance of a positive action infrequently.[61] When such situations do arise, however, the obligations can be so clear, pronounced and unwavering that it would be implausible to postulate an account of morality which is not consistent with and explicable of such a requirement.[62] In addition to the negative postulates of morality is one very important positive one: we must assist others in serious trouble *when assistance would immensely help them at little or no inconvenience to ourselves*.[63] This is the Maxim of Positive Duty.[64]

The Acts and Omissions Doctrine is incapable of explaining why individuals are appalled when they learn of clear breaches of this maxim. The public loathing directed at the passive witnesses of the 1964 murder of Kitty Genovese in Queens, New York is a practical illustration of the operation of the maxim (although as always, hindsight does wonders for moral judgement).[65] Whether harm ensues as a result of an act or omission

61. *See* Kuhse, *supra* note 55, at 297–98.

62. Bagaric, *A Utilitarian Argument*, *supra* note 57, at 174.

63. *See* SINGER, *supra* note 59, at 230–31. There are some who would deny that any such duty exists. *See, e.g.*, E. Mack, *Bad Samaritans and the Causation of Harm*, 9 PHIL. & PUB. AFF. 230 (1980) (arguing against the implementation of Bad Samaritan Laws as a cure for the harm caused by inaction). However, we agree with John Harris, who labels the denial of such a duty as "very odd," at least in an intuitive sense. JOHN HARRIS, THE VALUE OF LIFE 31 (1985).

64. *See generally* Bagaric, *A Utilitarian Argument*, *supra* note 57 (includes the Maxim of Positive Duty in a list of universal moral principles). *See, e.g.*, AMARASEKARA & BAGARIC, *supra* note 55 (concluding that legalization of euthanasia is misguided because the right to die for a few is outweighed by the right to live by the many; states that the "high demands of morality" at times requires the few to suffer in order to promote the common good); Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 55 (1992) (providing examples from international human rights law suggesting that there is a principle of positive duty regarding prevention and protection of human rights).

65. Kitty Genovese was beaten and stabbed by her assailant over a 35 minute period in Queens, New York. The assault took place within the view of 38 "normal," law-abiding citizens who did nothing to assist her. Witnesses failed to call the police or even yell at the offender. When a 70-year-old woman finally called the police, it took them only two minutes to arrive. Yet, by this time, Genovese was already dead. *See, e.g.,* LOUIS P. POJMAN, ETHICS: DISCOVERING RIGHT AND WRONG 1 (1990).

is not central to the moral appraisal of an action. The critical issue is whether one is responsible for the harm, where responsibility is assessed from the perspective of *all* of the norms and rules of morality, including the Maxim of Positive Duty.

Arguably, the Maxim of Positive Duty, as compared with the Acts and Omissions Doctrine, provides a far more accurate and coherent basis for rejecting intolerable demands on one's time and resources. Morality is essentially a set of negative constraints *plus* the Maxim of Positive Duty.[66] The proviso to the Maxim, "when there is little or no inconvenience to oneself," readily explains why our duty to assist others is extremely limited.[67] As one commentator on humanitarian intervention observed, "rescuing others will always be onerous."[68] As this statement makes clear, the definition of "little or no inconvenience" is crucial in determining what level of altruistic performance will be required by the Maxim.

This Maxim of Positive Duty ties in neatly with humanitarian intervention. As a maxim guiding behaviour, it explains why we are required to make some sacrifices for other people, even in distant parts of the world. Within the Maxim's proviso is the necessary limitation that we need not be "slaves" to the needs of others, running to every skirmish in any part of the world. Additionally, as will be discussed in the following section, it is important to note that our more distant fellow populations (our "non-neighbours," so to say) are included in this Maxim by virtue of the fact that there is no logical or normative basis for ranking the interests of one person higher than another.[69] The Maxim of Positive Duty always involves the need to weigh the

66. Bagaric, *A Utilitarian Argument*, *supra* note 57, at 174 (rejecting a subjectivist and cultural relativist approach to morality, the author lists four universal moral principles: (1) do not kill; (2) do not steal; (3) do not lie, and; (4) assist others when it will result in little or no inconvenience to oneself).

67. Of course, an ethical position based on the needs of others (such as that articulated by Emmanuel Levinas) would not recognise the self-centred (if pragmatically unexceptionable) limitation of reasonable personal cost. *See* John Morss, *Saving Human Rights from its Friends: A Critique of the Imaginary Justice of Costas Douzinas*, 27 MELB. U. L. REV. 889, 894–98 (2003).

68. Fernando Tesón, *The Liberal Case for Humanitarian Intervention, in* HUMANITARIAN INTERVENTION, *supra* note 1, at 129.

69. Bagaric, *A Utilitarian Argument*, *supra* note 57, at 177 (arguing that utilitarian morality is premised on widespread community support based on a reciprocal pursuit of happiness).

number of lives at stake against the resources that will be required to save those same lives.[70] Where the persons in need are "overseas," the resources that will be required are of an international nature.

B. The Doorstep Principle

In order for the Maxim of Positive Duty to have a practical effect it is necessary to address the Doorstep Principle. The Doorstep Principle describes the empirical fact that proximate suffering matters more to individuals than anonymous, distant suffering.[71] The fact that individuals are reluctant to advance the interests of their non-neighbours has no normative foundation.[72] The Doorstep Principle may be simply a general aspect of human nature, i.e., people have an increased psychological response to immediate perceptual events rather than remote ones.[73] Of course, it should also be acknowledged that sociopolitical forces and media influences have created a cultural milieu that prioritizes certain people (especially family) as deserving a significantly higher level of care than other people.[74]

For whatever reason, it appears that humans are driven to far greater lengths to assist those whose suffering they are forced to directly confront than those whom they can ignore.[75]

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70. This necessarily follows from the criteria used in the formula when applied to the context of humanitarian intervention.

71. *See* SINGER, *supra* note 59, at 224 (suggesting that when the people harmed are not identifiable individuals, it is difficult for people to comprehend a duty to attempt to save them).

72. The extent of another's suffering is not measured by our capacity to directly sense it, neither is the scope of our moral duties. SINGER, *supra* note 59, at 229–31 (arguing that the duty to save a child from drowning is no less compelling than assisting those living in absolute poverty).

73. Just as babies respond much more strongly to a "looming" object (i.e. an object approaching them on a "hit course" and thus perceptually expanding in a rapid and symmetrical manner) than to an approaching object that will safely bypass them. T.G.R. BOWER, HUMAN DEVELOPMENT 55 (1979).

74. The "global catastrophe" genre in literature and films tends to reinforce the special status of close kinship. The movie *The Day After Tomorrow* represents this tradition in its portrayal of a father's commitment to fulfill a promise made to his son, that promise acquiring the status of an oath. THE DAY AFTER TOMORROW (20th Century Fox Film Corp. 2004).

75. Robert Jackson, *International Community Beyond the Cold War*, *in* BEYOND WESTPHALIA, *supra* note 3, at 79 (noting that several highly-publicized attempts at mass immigration into First World nations resulted in

Of course, humans have a staggering capacity to ignore even very proximate suffering. A good example of individual willingness to ignore suffering is the notorious obedience experiments of Stanley Milgram.[76] Milgram's research subjects believed themselves to be taking part in an experiment on learning (which, in a sense, they were).[77] In the course of the experiment, subjects were directed to "punish" a stranger for his mistakes by using electric shocks.[78] The degree of pain the subjects believed they were inflicting upon the stranger was remarkable, even when the research subjects themselves were directly controlling the delivery of (supposed) electric shocks.[79] Additionally, when research subjects instructed a third person to administer the shocks, the voltage level used on the stranger increased dramatically.[80] Even when "victim" and subject were sitting next to each other, and delivery of the shock required that the subject physically place the victim's hand on a metal plate, many subjects still complied—turning their bodies away from the victim at the same time.[81]

Milgram's experiments show that humans are able to distance themselves from the suffering of others, even suffering they are directly inflicting. At another level, the infliction of pain on another person may be cognitively re-configured by the perpetrator as being unavoidable, beneficial, or the fault or desire of the other person. It is a small wonder that a majority of the citizens of the Third Reich were able to ignore the suffering of those persecuted by the government and placed in concentra-

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those nations taking action, in the form of economic aid, to support the immigrants' countries). As Robert Jackson has commented, "we may be our brother's keeper, but brotherhood for most purposes is limited to common nationality." *Id.*

76. *See generally* STANLEY MILGRAM, OBEDIENCE TO AUTHORITY (1974). The "victim" was an actor, and no shocks were actually delivered to him, but there is every reason to think the situation subjectively realistic. *Id.* at 3. Certainly the experimental subjects' reflections on their actions, following debriefing, are striking and convincing. *Id.* at 24.

77. *Id.* at 3.

78. *Id.*

79. *Id.* at 5 (a substantial proportion of participants were willing to shock the "victim" at the highest level on the generator, 450 volts).

80. *Id.* at 119, 122.

81. *Id.* at 33–36.

tion camps.[82] Thus, immediate lives weigh far more heavily on the sympathy scale than distant ones—at least when perceived immediacy is accepted as having more than a merely physical dimension.[83]

1. Ignoring the Interests of Our Non-Neighbours is Unjustified

Most adults in the First World are aware that every minute of the day people are dying in distant parts of the world due to readily preventable causes. The fleeting glimpse of starving children on the evening news appears to evoke some sense of sympathy, guilt or responsibility in most people. Unfortunately, humans are too good at escaping these feelings. Rather, we need to be educated that the limits of personal and State responsibility are not exhausted by our capacity to successfully block out "distant" human suffering and recognize that "[n]othing justifies valuing one life ahead of another."[84] There is simply no logical or normative principle which can be universally applied for ranking one person's happiness above the next person.[85]

The Doorstep Principle sums up why nations have been slow to stop the mass killing of other countries' citizens by their own governments. Additionally, it explains why First World countries have been, despite an overt commitment to human rights and equality, spectacularly successful in ignoring the plight of

82. *See generally* DANIEL JONAH GOLDHAGEN, HITLER'S WILLING EXECUTIONERS (1996) (describing the role of ordinary German citizens in the Holocaust).

83. This seems to be one explanation for the fact that in 1995, the Australian Government spent $5.8 million rescuing French sailor Isabelle Autissier, who was stranded while on a solo voyage around the world, when the same money could have saved thousands from starvation. *Gender, Sexualities and Sport*, THE SPORTS FACTOR, June 27, 1997, *at* http://www.ausport.gov.au/fulltext/1997/sportsf/sf970627.htm.

84. Peter Singer, *Nothing Justifies Valuing One Life Ahead of Another,* THE AGE (Austl.), Apr. 1, 2003, *available at* http://www.theage.com.au/articles/2003/03/31/1048962698034.html.

85. Self-interest or self-preservation may explain an agent ranking *his or her* interests over those of another person, but these considerations cannot ground a general principle justifying such conduct. From the perspective of the other person, the same considerations support a preference in his or her favor.

those in Third World countries.[86] In order for humanitarian intervention to become an established norm, it is necessary to debunk the Doorstep Principle and to adopt the Maxim of Positive Duty. It is only after such a change that genuine, effective moral pressure can be placed on States. Eliminating the Doorstep Principle from our collective psyche is, admittedly, not likely to be an easy matter. However, as with any reform, the first step to progress is identification of a problem.

IV. CIRCUMSTANCES IN WHICH HUMANITARIAN INTERVENTION IS JUSTIFIED: TOWARDS "RULES OF ENGAGEMENT"

A. Overview of Problems

In setting the boundaries for legitimate humanitarian intervention, it is important to be cognisant of the difficulties of such measures. The first difficulty of humanitarian intervention stems from the inherent contradiction in using force in order to protect rights.[87] Force invariably results in the killing of people, and hence violates what might be thought of as the most fundamental right of all—the right to life itself.[88] The "rules of engagement" for humanitarian intervention must surely take account of this *proportionality* issue. Issues concerning the proportionality of force arise both with respect to the initiation of military conflict (*jus ad bellum*) and the conduct of military forces in conflict situations (*jus in bello*). Generally, it is difficult to determine the exact interests that the international community should defend via force.[89] Questions as to whether other nations should forcibly defend only the basic right to life, or whether they should also be concerned with lesser rights, such as the right to own property, to vote, to privacy, to freedom

86. Simonovic, *supra* note 15, at 380.

87. *See generally* CHRISTOPHER G. WEERAMANTRY, ARMAGEDDON OR BRAVE NEW WORLD: REFLECTIONS ON THE HOSTILITIES IN IRAQ (2003) (discussing the possible effects the U.S./U.K. invasion of Iraq will have on international law; advocating for the international community to embrace the United Nations and its fundamental policy against the use of force).

88. G.A. Res. 217A, U.N. Doc. A/810, at 72 (1948) ("Everyone has the right to life, liberty and security of person.").

89. Yoo, *supra* note 9, at 794.

of association, and so on, must be addressed.[90] The broader the scope of protected rights, the greater likelihood for interpretative arguments, and hence abuse.[91]

A second difficulty is that any principle prescribing humanitarian intervention is likely to be imprecise—leaving ample scope for self-serving interpretation.[92] As one well-known commentator observed,

> [T]he pages of history abound with instances of governments waging war to edify citizens marooned on unenlightened shores, the loftiness of ethical ambition matched only by imperial appetite. Cicero's theory of *jus gentium* sanctioned the expansion of the Roman Empire and the slaughter of the barbarians at the gates; Alberico Gentili infamously justified the Spanish conquest of the new world by the need to correct the behaviour of savages ignorant of natural law; and Hugo Grotius' stout legitimation of the 'right to punish' complemented perfectly the ascent of Dutch colonial ambition.[93]

More recently, it was observed that: "[s]tates strong enough to intervene and sufficiently interested in doing so tend to have political motives. They have a strong temptation to impose a political solution in their own national interest."[94] Thus safeguards, in the form of a reasonableness requirement, must be developed to prevent states from manipulating the principle authorising humanitarian intervention to serve their narrow

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90. *See, e.g.*, James Gathii, *Foreign and Other Economic Rights upon Conquest and Under Occupation: Iraq in Comparative and Historical Context*, 25 U. PA. J. INT'L ECON. L. 491 (2004) (discussing private property rights after the 2003 occupation in Iraq and elsewhere).

91. Mirko Bagaric & James McConvill, *The War in Iraq: The Illusion of International Law? Where to Now?,* 8 DEAKIN U. L. REV. 147, 171 (2003). This propensity for interpretive arguments and abuse is evident in the self-defense argument used by the United States in the most recent war against Iraq. *Id.* at 157.

92. As in "the ideology of the redeemer nation," described by Deborah Weissman, where the intervening state entertains a perception of itself as the savior of the populous of the occupied state. Deborah Weissman, *The Human Rights Dilemma: Rethinking the Humanitarian Project*, 35 COLUM. HUM. RTS. L. REV. 259, 266 (2004). *See also* Gathii, *supra* note 90, at 555 (describing how there is typically an encounter based on a "self-righteous Western cultural project" contrasted with a non-Western civilization that is perceived as "backward, barbaric, poor, smelly, and lazy.").

93. Upcher, *supra* note 4, at 265.

94. Schachter, *supra* note 42, at 1629.

political interests. Development of the principle may well stand or fall on the effectiveness of such safeguards of reasonableness.[95] Therefore, such safeguards should be built into any "rules of engagement."

B. Setting Out the Criteria

To begin, it is important to tentatively identify grounds for military intervention into another nation based upon humanitarian concerns. The issue of *necessity* is clearly central to humanitarian intervention.[96] As James Upcher comments:

> In many respects, necessity serves as a repository of assorted doctrines that can wheel international law into a place at the table. It is a pliable friend, serving both moral and strategic masters ... necessity is sufficiently amorphous to respond to the asymmetric threats posed by terrorism, unshackling states from the self-defence mechanisms of the UN Charter, and massaging pre-emption into a legitimate legal category.[97]

Thus, necessity as a legitimation of intervention must be scrutinised in the broad context of the international use of force. This Article is not intended to support the employment of the necessity argument by military aggressors. Therefore, (humanitarian) necessity needs to be defined to exclude military adventure and opportunism. In so doing, the present status of necessity as a general category for international action should not be affected.[98] Certainly, once humanitarian necessity is better defined, other putative forms of necessity will require corresponding clarification. It may well be that outside of (properly

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95. *See e.g.*, Keohane, *supra* note 28, at 275.

96. At the International Court of Justice in 1999, the Federal Republic of Yugoslavia claimed that the NATO bombing of Kosovo was against international law. Belgium responded that NATO action was justifiable under the principle "of necessity … which justifies the violation of a binding rule in order to safeguard, in the face of grave and imminent peril, values which are higher than those protected by the rule which has been breached." Upcher, *supra* note 4, at 275 (citing Oral Pleadings of Belgium, Legality of the Use of Force (Yugo. v. Belg.), CR/99/15 (May 10, 1999) (uncorrected translation available at http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm)).

97. Upcher, *supra* note 4, at 274.

98. Though, potentially, necessity justifications may be constrained. Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 9–10 (2004).

delimited) self-defence and humanitarian necessity, necessity is a vanishingly small category of defence for a state's activities,[99] as it has proved to be within individual criminal justice.

An innovative extension of necessity, in the context of humanitarian intervention, has been urged by Antonio Cassese.[100] Traditionally, in order to substantiate use of customary international law, state conduct needed to be accompanied by a more subjective sense of legal obligation—the *opinio juris sive necessitatis.*[101] Cassese explored the idea that the subjective element of *opinio juris* is not required, as such, if a state believes that it is acting out of political, economic or moral necessity.[102] Cassese calls this concept the *opinio necessitatis*.[103] In the case of Kosovo, for example, Cassese proposes that the evidence of such *opinio necessitatis* was "strong and widespread."[104]

Cassese's theoretical claim is speculative and perhaps premature, but his related list of preconditions for humanitarian countermeasures is illuminating. Political, social and moral necessity are not boundless concepts. Rather, Cassese provides

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99. Presumably, a natural disaster like a tidal wave or earthquake, or even perhaps a man-made localised catastrophe, might justify mass incursion of one state's population into another state to escape the danger.

100. Antonio Cassese, *Ex Inuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23, 23 (1999) [hereinafter Cassese, *Ex Inuria Ius Oritur*]; Antonio Cassese, *A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*, 10 EUR. J. INT'L L. 791, 791 (1999) [hereinafter Cassese, *A Follow-Up*].

101. Cassesse, *A Follow-Up*, *supra* note 100, at 797. *See also* Allen Buchanan, *Reforming the International Law of Humanitarian Intervention*, *in* HUMANITARIAN INTERVENTION, *supra* note 1, at 134–36 (discussing use of customary international law in the context of humanitarian intervention and the role of *opinio juris*).

102. Cassesse, *A Follow-Up*, *supra* note 100, at 797. *See also* Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 EUR. J. INT'L L. 523, 534–35 (2004) (discussing the subjective obligatory component of *opinio juris*).

103. Cassese, *A Follow-Up*, *supra* note 100, at 797. An unfortunate term in view of the complete phrase, *opinio juris* s*ive necessitatis*. Cassese's concept was that the *act* was considered necessary, rather than compliance with an international customary law being necessary or obligatory (as with the orthodox requirement of *opinio juris)*. *Id.*

104. *Id.* at 798. Cassese argued that those (NATO) states that intervened in Kosovo did so on the genuine basis that genocidal aggression would continue until such action was taken. *Id.* at 797.

six conditions for armed intervention in the absence of Security Council authorisation: (i) gross breaches of human rights by a government or with its connivance or resulting from its collapse; (ii) inability or unwillingness by the government to prevent the breaches, or to allow outside help; (iii) inability or unwillingness of the Security Council to take action; (iv) exhaustion of practicable peaceful options; (v) involvement of a group of states in the intervention and with some measure of General Assembly approval; (vi) rapid termination of military action once abuses have been terminated.[105]

While the sentiments expressed by the cumulative operation of these conditions are laudable, ultimately the conditions may well be too expansive. The fourth condition, requiring the exhaustion of practicable peaceful options, may in particular introduce unnecessary obstacles to (or at least delays to) intervention. Humanitarian intervention is appropriate when large-scale killings are government sanctioned and/or conducted by elements within a State which cannot be stopped by the government. This is the only condition that needs be satisfied in order to justify armed humanitarian intervention. It is important to emphasise that the only currency we are concerned with is the death of innocent people. Other human rights abuses, no matter how likely and how egregious, are unlikely to warrant intervention—given the inevitable loss of life caused by military intervention and the requirement of proportionality.

1. Proportionality

Necessity, properly defined, may thus fulfil the requirements of "*ad bellum*"—the decision to initiate intervention—but cannot fully determine the "*in bello*"—the conduct during the intervention. To ensure that intervention is not self-defeating, a principle must be adopted that acknowledges that the number of lives that are likely to be lost as a result of the intervention cannot exceed the number that are likely to be lost if no action is taken.[106] This condition has its root in the Principle of Proportionality. As Richard Fox notes, the notion that any response must be commensurate to the harm caused, or sought to be pre-

105. Cassese, *Ex Inuria Ius Oritur*, *supra* note 100, at 27.

106. This requirement is also suggested by Cassese's sixth condition for military intervention without Security Council approval. *Id.*

vented, strikes a strong intuitive chord.[107] The concept of proportionality underpins many domestic and international legal maxims.[108] In its most simplistic (and most persuasive) manifestation, proportionality provides that "the punishment should fit the crime."[109] It is also part of the reasoning behind civil law damages, which aim to compensate for the actual loss suffered, and equitable remedies, which are proportional to the detriment sought to be avoided.[110]

Proportionality also underpins the notion of self-defence at the individual level. Self-defence, as a defence to an individual crime, would be unavailable to a person whose response to being pushed in a crowd was the use of lethal force.[111] Such a violent response would not be considered self-defence because it is entirely out of proportion with the initial action. Lethal force is generally considered self-defence only when an individual's life is threatened.[112] Additionally, the notion of self-defence may extend to the defence of another. In certain circumstances, an individual may use lethal force to protect the life of a third person.[113] Such parallels between humanitarian intervention and

107. Richard Fox, *The Meaning of Proportionality in Sentencing*, 19 MELB. U. L. REV. 489, 491 (1994).

108. *See, e.g.*, *id.*; Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 391 (1993).

109. The phrase is derivative from W. S. Gilbert's *The Mikado,* but may be said to characterise a sentiment going back at least to the "an eye for an eye" of the Old Testament. W. S. Gilbert, *A More Human Mikado*, *in* THE MIKADO OR THE TOWN OF TITIPU (Opera: First perfomed on Mar. 14, 1885).

110. Fox, *supra* note 107, at 491.

111. Other potential examples include: a homeowner shooting a person before he entered the homeowner's property or a homeowner who captures the burglar and keeps him chained up as his slave.

112. *See* Model Penal Code § 3.04, *reprinted in* JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW CASES AND MATERIALS 1175 (3d ed. 1996). Lethal force may be used in self-defense only if it is necessary to prevent the individual's death, but may not be used if: the individual provoked the use of force, the individual is able to retreat from the situation, or otherwise surrender possession of an item or comply with a demand. MPC § 3.04(2)(b). *Id.* at 1176.

113. *See* Model Penal Code § 3.05, *reprinted in* KAPLAN ET AL., *supra* note 112, at 1176. The right to use force to protect a third person is justifiable under MPC §3.05 when: (1) the actor would be justified in using force to protect himself if he were in the situation of the third person, and (2) under the circumstances as he believes them to be, the third person would be justified in using force, and (3) the actor believes the intervention is necessary. *Id*.

self-defence are important. In effect, the principle of humanitarian intervention advanced in this Article seeks to establish a norm of defence of another, similar to that provided by criminal law, as a maxim of international law.

The proportionality requirement will necessarily be crude when it comes to comparing the likely loss of lives that will stem from military intervention as opposed to inaction. However, with increasingly sophisticated weaponry and intelligence equipment now being used in modern day combat (as was demonstrated in Iraq in 2003)[114] and the supreme military advantage enjoyed by the United States and other Western powers over those States who are likely objects of humanitarian intervention,[115] we argue that a meaningful estimate of the number of lives to be lost as a result of intervention is possible. This estimate must include the likely loss of personnel defending a State from what they perceive or are instructed to perceive as an invasion. As noted above, there is no moral bookkeeping mechanism that justifies prioritising the loss of one life over another. While the conditions in which humanitarian intervention is justifiable can be clearly stated to avoid misuse of this power, there are several constraints that must be developed.

2. Reasonableness

In devising an effective principle of humanitarian intervention, an important objective is to prevent (as much as possible)

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114. *See, e.g.*, Alessandra Stanley, *A Nation at War: The TV Watch*, N.Y. TIMES, Mar. 23, 2003, at A1 (describing the televising of the initial invasion and the "riveting display of American power").

115. Such disparity in military and political might can have substantial impact on the global outcry over abuses, and States' willingness to initiate intervention. It may be observed that human rights abuses by China (e.g., in Tibet or in Tianenmen Square), Russia (e.g., Chechnya), or, arguably, the United States (in Guantanamo), have not called forth military intervention by Third World states. *See, e.g.*, Jane Perlez, *U.S. Report Harshly Criticizes China for Deterioration of Human Rights; Russia Also Faulted*, N.Y. TIMES, Feb. 26, 2000, at A8; *Asia Hesitant to Ease Curbs Despite Rapid Growth: Human Rights Watch*, AGENCE FRANCE PRESSE, Jan. 14, 2005; Peter Small, *Tianenman Survivors Remember Candlelight Vigil Tonight in Toronto*, THE TORONTO STAR, June 4, 1994, at A21; Michael Wine, *Rights Group Cites Abuses by Moscow and Chechen Guerillas*, N.Y. TIMES, Jan. 30, 2003, at A3; Joel Brinkley, *Report Says U.S. Human Rights Abuses Have Eroded Support for Efforts Against Terrorism*, N.Y. TIMES, Jan. 15, 2003, at A9.

occupying forces profiting or otherwise benefiting from their intervention. Once stationed in another state, it is not difficult for an occupying force to argue for ongoing occupation on the basis of the ongoing need to preserve law and order, even if the occupation has contributed to the problem.[116] As a result, an occupation that was initially lawful may later become unlawful.[117] This problem raises issues that go beyond straightforward proportionality.

This danger can be minimised by ensuring that a minimum number of nations with seemingly disparate interests must form part of any "intervening team."[118] This should be buttressed with the principle that the occupying force must exit immediately upon a new government being installed, which must be done within a defined period after the removal of the (presumably totalitarian) regime.[119] This period should be no more than twelve months. To ensure timely exit of occupying forces, a reciprocal citizenship principle should be established, giving citizens of the "liberated" state automatic citizenship rights in the state of the occupier(s) if the occupation extends beyond the twelve month period.[120]

A cautious analogy may be drawn with respect to the conditions under which human rights protection may be abrogated

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116. This is patently the case in present-day Iraq. More generally, democratic accountability mechanisms are inadequate in relation to troops dispatched overseas. Michael Glennon, *The United States: Democracy, Hegemony, and Accountability*, *in* DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW 344 (Charlotte Ku & Harold Jacobson eds., 2002).

117. Schachter, *supra* note 42, at 1630–31. Generally, this is an issue of necessity. *Id.* If the intervention is prolonged beyond the need that initially gave rise to the intervention, or if the interveners abuse their power through subsequent interference with the state, the intervention loses its legal quality. *Id.*

118. Again, this is in line with Cassese's proposals. Cassese, *Ex Inuria Ius Oritur*, *supra* note 100, at 27.

119. For a discussion of the present humanitarian obligations of an occupying force, see HUMAN RIGHTS WATCH, INTERNATIONAL HUMANITARIAN LAW ISSUES IN A POTENTIAL WAR IN IRAQ, sec. IX, *at* http://www.hrw.org/backgrounder/arms/iraq0202003.htm (last visited Jan. 7, 2004); WEERAMANTRY, *supra* note 87, at 67–73.

120. *See* Bagaric & McConvill, *supra* note 91, at 174. The twelve month period for humanitarian intervention settling and reconstruction is the only exception that should be permitted to the reciprocal citizenship principle. *Id.*

by states of "emergency." It is usually held that under certain narrow and short-term conditions, some human rights protections may be suspended by a state.[121] The state of emergency in such a case may be analogized to the emergency arising from human rights violations that instigate outside intervention. While seemingly representing the very opposite of the situation addressed by this Article—in one case a government-declared emergency giving rise to human rights concerns; in the other, human rights concerns giving rise to external intervention—the question addressed in both is the conflict of obligations and how this conflict may be resolved in a principled manner.[122] Indeed, for one state or group of states to invade another in the name of a humanitarian crisis is precisely to declare a state of emergency that legitimates the displacing of usual conventions.[123] Accordingly, for a state of emergency to legitimate the derogation of certain rights,[124] several specific conditions must be met. These include exceptionality, proportionality, non-discrimination, last resort, and a "principle of temporariness."[125] These conditions clearly parallel the prerequisite conditions necessary for legitimate military intervention.

3. Rules of Engagement

The suggested rules of engagement, namely necessity, proportionality, and reasonableness, all correspond to the accepted limits on self-defence in both individual criminal and in inter-

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121. *See* ANNA-LENA SVENSSON-MCCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION 567 (1998).

122. *See generally* ORAA, *supra* note 29. Also note, for a state to proclaim an emergency (putatively, to legitimate derogation of rights) is itself not an exclusively internal affair according to the UN Commission on Human Rights. *Id*. at 247. Parallel to this is the international status or salience of a serious humanitarian crisis within the boundary of a state. *Id.* In both circumstances, "normal" state sovereignty is called into question. *Id.*

123. *Id*. at 34.

124. There are four rights commonly asserted in three major instruments (International Covenant on Civil and Political Rights, Dec. 16, 1966, 993 U.N.T.S. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights, Nov. 22, 1969, 1114 U.N.T.S. 123) to be non-derogatable: life, freedom from torture, freedom from slavery, and non-retroactivity of penal laws. ORAA, *supra* note 29, at 96, 264.

125. *Id.* at 225, 260.

national contexts. This is no accident. In both humanitarian intervention and self-defence, force is being sanctioned; however, that sanction is highly conditioned. As noted above, humanitarian intervention and self-defence are highly analogous.[126] Yet, there is also one important difference: self-defence (despite the implicit factor of necessity) cannot represent an imperative, as we are advocating should be the situation with humanitarian intervention.

4. The Move from Grace and Favour to Expectation

Humanitarian intervention may rarely be justified, but when cases arise it surely must be considered an imperative. While it may generally be thought philosophically dubious to move from "is" to "ought," the move seems legitimate in such situations. Facts should drive actions. The difficulty, perhaps, lies in the fact that States (or other organisations, such as NGOs), rather than individuals, would be subject to the "ought." Yet, a parallel could be drawn with Article 39 of the United Nations Charter, under which the Security Council is *directed* to "determine the existence of any threat to peace…" *and* to make appropriate recommendations or take action in response to such a threat.[127] Moreover, there are international obligations under the 1982 Law of the Sea Convention for States to "cooperate to the fullest possible extent in repression of piracy,"[128] an obligation that derives from long-standing custom. Heinous acts, such as genocide, give rise to not only universal jurisdiction,[129] but also (at least arguably) to some obligation to take appropriate action. The organ that should be charged with this duty is the Security

126. *See infra* Part IV.B.1.

127. U.N. CHARTER art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.").

128. United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 100, 21 I.L.M. 1261, 1288 ("All states shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.").

129. ROBERT MCCORQUODALE & MARTIN DIXON, CASES AND MATERIALS ON INTERNATIONAL LAW 288 (4th ed. 2003).

Council, given that it is the U.N. entity authorised to approve military action.[130]

Presently, there are two situations in which the Security Council can authorise the use of force. These relate to:

1. The right of individual or collective *self-defence* in response to an armed attack provided under Article 51 of the Charter.[131]
2. *Specific authorisation* of the use of force by the Security Council as a last resort to maintain international peace and security under Chapter VII of the Charter.[132]

Military action aimed at preventing the killing of people by their own government does not fit *neatly* into any of these categories unless it has the potential to escalate into a wider conflict. However, as noted in Part II, although humanitarian intervention is rarely (clearly) permitted under existing international law, it is seldom the subject of wide-ranging or intense criticism.[133] In part, this is no doubt a result of the malleable and seemingly directory, as opposed to compulsory, nature of international law. In order to clearly accommodate humanitar-

130. U.N. CHARTER ch. VII. *See also* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 213–15 (2003).

131. U.N. CHARTER art. 51. Article 51 states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id.

132. U.N. CHARTER art. 42. In addition to this, it has been argued that a customary international law right of pre-emptive self-defense may exist. *See generally* Christopher Posteraro, *Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention*, 15 FLA. J. INT'L L. 151 (2002) (discussing preemptive self-defense); *see also* Robert J. Beck & Anthony C. Arend, *International Law and Forcible State Response to Terrorism*, 12 WIS. INT'L L.J. 153, 213 (1994) (discussing various scholars opinions on the topic, but ultimately concluding that there is no general consensus).

133. *See infra* Part II.B.

ian intervention, it is desirable to amend the Charter to expressly provide for a norm of intervention in the circumstances outlined in this Article.

The most effective means to achieve the goal underpinning humanitarian intervention is to make military intervention mandatory in cases of actual or impending human catastrophe. History shows us that (even if one ignores self-interest) left solely as a discretionary aspiration goal, States have too much armoury at their disposal—in the form of the Acts and Omissions Doctrine and the Doorstep Principle—to expect more than token or patchy adherence to saving the lives of innocent people in distant parts of the world. We are not suggesting that the members of the Security Council should alone assume the military responsibility for providing troops and weapons to neutralise tyrannical regimes. This would be best achieved by giving the Security Council the authority to muster "Coalitions of the Willing,"[134] perhaps selected by ballot, to supply the necessary resources.

Unfortunately, the notion of compulsion in international law is not well-defined.[135] It is even less well-policed and enforced. This is especially the case where the (potential) violators are powerful States, such as those forming the Security Council. Clearly, threats of military action or economic sanctions will not be countenanced against such States if they breach their duty of humanitarian intervention. Certainly, these States would not agree to a resolution proposing the possibility of tangible sanctions against themselves.[136] Therefore, a more modest, yet equally effective, mechanism is required.

A way forward is to expand the provisions of the *Convention Relating to the Status of Refugees 1951*[137] to accord a right of asylum in Security Council nations to people who manage to

134. *See, e.g.*, Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 348, 351 (2000) (describing Sen. Helms suggestion that "coalitions of the willing" would help sovereign nations coordinate collective action).

135. Universality, where it exists, is thus a matter of jurisdiction which empowers rather than compels States to undertake certain extraordinary actions. MCCORQUODALE & DIXON, *supra* note 129, at 288.

136. *See supra* note 115 and accompanying text.

137. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

escape a humanitarian disaster when the Security Council, for whatever reason, has been remiss in discharging its obligations. Of course, this provision would require a body which could serve as arbiter to determine if the Security Council has breached its duty. It would be reasonable to have the arbiter role filled by providing extraordinary jurisdiction to the International Court of Justice (ICJ), coupled with a stipulation that ICJ jurisdiction could be invoked by an individual who claims standing as a refugee from a nation torn by military conflict. If expanding this provision is thought to be too ambitious (or for any other reason unachievable), there is still considerable utility in mandating a requirement of humanitarian intervention. Even absent a tangible sanction against those putatively responsible for launching the intervention, the detriment to a State's reputation is a powerful tool against their inaction. The moral condemnation that stems from breaching a duty, while not an irresistible lever, is infinitely preferable to the total impotence that stems from the mere "adoption" of aspirational ideals.

V. CONCLUSION

The lessons of history show that there is little, if any, appetite to provide humanitarian assistance to other States. Thus, any force sanctioned on this basis will often be for an ulterior, self-interested motive. This is not necessarily a problem. As long as the humanitarian crisis is resolved, the motive that underpinned the intervention may be of secondary importance. However, impure motives can lead to continuing problems—"protectors" can readily become "exploiters." Once a State has a foothold in another State, the potential for self-interest to dominate is immense. The tendency toward self-interest provides a window into the international community's hesitance to mandate military intervention for humanitarian purposes. It has been said that "[t]he human rights project must be fixed to prevent it from becoming a system that facilitates the self-serving desires of a dominant nation."[138]

However, an absolute rule preventing the use of force in such circumstances might lead to unthinkable tragedies in the future. The horror of such situations urges strongly in favour of

138. Weissman, *supra* note 92, at 336.

humanitarian intervention in extreme circumstances. Such intervention should be constrained to situations of impending large scale tragedy. The executions by Idi Amin's Ugandan government of approximately 300,000 people in the 1970s would surely satisfy this requirement,[139] as would the killing of over two million people between 1975 and 1979 in Cambodia by the Pol Pot-led Khmer Rouge.[140] Situations akin to the selective food distribution in Ethiopia in 1987, which led to millions of people starving, would also justify humanitarian intervention.[141] Indeed, with starvation continuing to be a massive problem in Ethiopia,[142] it is arguable that humanitarian intervention would be justified in Ethiopia at the present time. At the time of writing this Article,[143] the Sudanese government was in the process of slaughtering and driving out thousands of members of the Zaghawa, Masalit and Fur tribes in the Dafur region of Sudan, through its instruments, the Janjaweed militias.[144] It is estimated that 320,000 Sudanese will be killed in 2004.[145] This is a situation crying out for humanitarian intervention. Situations like it will no doubt continue to arise until humanitarian intervention is transformed from an expedient accident to a categorical imperative.

139. Bazyler, *supra* note 2, at 590; Andrew Field, *The Legality of Humanitarian Intervention and the Use of Force in the Absence of United Nations Authority*, 26 MONASH U. L. REV. 339, 351 (2000).

140. Associated Press, *Key Events Regarding Pol Pot and Khmer Rouge,* CNN.com, *at* http://www.cnn.com/WORLD/asiapcf/9804/16/pol.pot.timeline/ (last visited Jan. 9, 2005). *See also* Bazyler, *supra* note 2, at 550 (noting the killing of one to three million people in Cambodia).

141. Bazyler, *supra* note 2, at 611–18.

142. There were reports late in 2002 of at least eleven million Ethiopian people close to starvation and about thirty million people throughout Africa on the verge of starvation. *See* Sudarsan Raghavan, *Eleven Million Ethiopians May Face Starvation by March*, KNIGHT RIDER WASH. BUREAU, Dec. 12, 2002.

143. August 2004.

144. Nicholas Kristof, *This is Genocide and it is Happening NOW*, THE AGE (Austl.), June 18, 2004, at 15.

145. This is considered a conservative estimate provided by the U.S. Agency for International Development. *Id*.